

FCC MAIL SECTION
Before the
Federal Communications Commission
Washington, D.C. 20554
MAR 8 2 13 PM '93

DISPATCHED BY ✓
DMM Docket No. 93-44

In re Applications of

RURAL INITIATIVES
FOR SHELTER AND
EDUCATION
(hereafter "Rural")

File No. BPED-870817MC

AMERICAN INDIAN
BROADCAST
GROUP, INC.
(hereafter "Group")

File No. BPH-870820MB

For Construction Permit
for a New FM Station on Channel 279A (103.7 MHz)
in Hartford, Michigan

HEARING DESIGNATION ORDER

Adopted: February 23, 1992;

Released: March 8, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rural*. Rural proposes a tower site 161.8 kilometers from the licensed site of FM Station WEZW, Channel 279B, Wauwatosa, Wisconsin. Pursuant to Section 73.207 of the Commission's Rules, Rural's site must be at least 163 kilometers from WEZW's. Thus, Rural's proposal is short-spaced by approximately 1.2 kilometers. In light thereof, Rural requests a waiver of the rule. In support of its request, Rural asserts that a grant would permit noncommercial operations on an existing tower, thereby saving the nonprofit applicant "substantial" sums which would otherwise be expended on construction and land acquisition. According to Rural, the public interest would benefit if it were able to devote these savings to enhanced programming. Further, Rural asserts that the resultant overlap between its 34 dbu contour and WEZW's 54 dbu contour would occur entirely over Lake Michigan, and, accordingly, the policy underlying the separation standards would not be undercut.

3. The Commission determined that the minimum mileage separation standards, as embodied in the table of frequency allotments set forth in 47 C.F.R. 73.207, offered the best means for achieving an orderly, efficient, and effective development of the commercial FM broadcast service. *First Report and Order in Docket 14185*, 33 FCC 309 (1962). An applicant requesting a waiver of the separation standards

must first demonstrate that other, conforming, sites are unavailable. It must also demonstrate that a grant would further the public interest. *Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976). The threshold showing, however, is not necessary where the proposed short-spacing is *de minimis*, or no more than one mile. See *Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712 (1990). Insofar as Rural proposes a mere 1.2-kilometer short-spacing, the *de minimis* criterium is satisfied, and the need for the threshold showing is obviated. See, e.g., *Kenter Broadcasting Company*, 62 RR 2d 1573, 1577 n.9 (1986), *affirmed*, 816 F. 2d 8 (D.C. Cir. 1987) (*per curiam*).

4. The Commission has recognized benefits to the public interest arising out of short-spaced proposals, such as the avoidance of environmental questions. 5 FCC Rcd 3712. It has also noted the public interest benefits of co-locating transmission facilities. *Beasley Broadcasting of Philadelphia, Inc. (WXTU)*, 100 FCC 2d 106 (1985).¹ Here, as in *Beasley*, an evaluation of all relevant factors tilts the balance in favor of a grant of the requested waiver, and it will be granted below.

5. Section II, Item 7 of the FCC Form 340 (May 1985) filed by Rural asks whether documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that: (a) voting rights will remain with the applicant, even in the event of default on the obligation; (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission will be obtained. A negative response requires attachment of an Exhibit providing a full explanation. Rural answered Item 7 in the negative, but failed to provide the requisite explanation. Accordingly, it will be required to do so below.

6. Rural's application contains a discrepancy between the tower height above ground level ("AGL") listed in Section V-B, Item 9 and the value on file with the Commission for the tower proposed by Rural for its antenna, that of WEZW, Wauwatosa, Wisconsin. Specifically, in Section V-B, Item 9, Rural specified the tower height AGL as 316 meters. However, according to the Commission's records, the tower height AGL of the WEZW tower is 100 meters and the tower height above mean sea level ("AMSL") is 316 meters. We note that the application's tower sketch, submitted as Engineering Exhibit E-3, lists the tower heights as 100 meters AGL and 316 meters AMSL. Since the application specifies an existing tower for which data are on file with the Commission, this discrepancy constitutes neither an acceptability nor a tenderability defect and may be corrected by an amendment. Rural will be directed to file such an amendment below. Furthermore, because the discrepancy concerns tower height AGL, an air hazard issue will be designated against Rural in this Order. Should Rural timely file a corrective amendment, the Judge may dismiss the issue.

7. *Group*. Pursuant to 47 C.F.R. § 1.65 requires that applicants maintain the continuing accuracy and completeness of their proposals with respect to all matters which may be of decisional significance. Group filed several amendments detailing the status of its other media interests, the latest being filed on July 18, 1990. However,

¹ In *Beasley*, the Commission discussed the benefits of *de facto* antenna farms. Although Rural does not mention an antenna

farm, the benefits to the public of co-locating on an existing tower appear similar.

dispositive action has since been taken on several of Group's then-pending proposals. For example, its application for a new FM station in San Angelo, Texas, (File No. BPH-870921MB) was granted on January 25, 1991, and its application for a new FM station in Vero Beach, Florida (File No. BPH-880523MF) was dismissed on January 2, 1991. Accordingly, Group will be required to file an amendment listing its current media interests.

8. As stated previously, Rural proposes to sidemount its antenna on the existing tower of station WEZW, Wauwatosa, Wisconsin; Group proposes to construct a new tower. Our engineering study indicates that both proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that (applicant) may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Specifically, Rural has not indicated how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, and Group has not submitted the requisite agreement among WEZW tower users with respect to how such workers will be protected. Accordingly, both applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65, (October 1985) entitled "Evaluation Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Accordingly, both applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

9. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT

Group

AMENDMENTS FILED

April 28, 1988; July 11, 1988; October 27, 1988; February 17, 1989; June 1, 1989; August 8, 1989; September 7, 1989; October 27, 1989; April 13, 1990; July 18, 1990.

10. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Group would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Rural and Group in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the Rural and Group would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That Rural's request for waiver of 47 C.F.R. § 73.207 IS GRANTED.

14. IT IS FURTHER ORDERED, That Rural shall file amendments providing the requisite explanation for its negative response to Section II, Item 7, FCC 340 (May 1985) and correcting the discrepancy in tower height above ground level with the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That Group shall submit an amendment which details each of its media interests with the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Group ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties which have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (*see* Section 1.325(c)(1) of the Rules; and (b) the Standardized integration Statement (*see* Section 1.325(c) of the Rules), which must also be filed with the presiding officer. Failure to serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 168 (1990), *erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau